ANALYSIS

OF

MAINE'S 'ANCIENT LAW'

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WITH NOTES

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[*SECOND EDITION REVISED.*]

Oxford

BASIL BLACKWELL, BROAD STREET

1922

NOTE.

The following pages are only intended to help those unfamiliar with the arrangement of Maine's 'Ancient Law' by giving a slight outline of the more important parts of it, and providing a few of the more obvious commentaries needed. For fuller discussion of questions raised recourse must be had to Sir Frederick Pollock's annotated edition of 'Ancient Law.' To him and Professor Vinogradoff the author's thanks are due for the free use that they have allowed him to make of their writings on the subject, as also for the former's kind help and suggestions.

References are given to Sir Frederick Pollock's Edition, (John Murray, 1920), and those passages which are identified by the first and last words, are intended to be read in with the text of these notes.

INTRODUCTORY NOTE.

Sir Henry Maine.

HENRY SUMNER MAINE was born in 1822 and died in 1888. He was a great scholar and held several University posts, but he was also a journalist, a lawyer and an administrator. He always suffered from weak health, and this prevented him from working much at detail. 'His inability for drudgery shows itself by one weakness of his books, the almost complete absence of any reference to authorities.' He was temperamentally conservative and anti-democratic, but his views were very independent and never quite fitted in with those of any political party. His various appointments enabled him to study particularly Roman and International Law and Indian institutions. He was successively Regius Professor of Civil Law at Cambridge, Reader in Roman Law at the Inns of Court, Legal Member of the Council in India, Corpus Professor of Jurisprudence at Oxford, Master of Trinity Hall, Cambridge, Member of the Indian Council, and Professor of International Law at Cambridge.

Importance of 'Ancient Law' (first published 1861).

(*a*) It was the first *scientific* work on historical jurisprudence.

Prof. Vinogradoff has described science as 'the acquisition of exact knowledge based upon observation, and aiming at the formulation of laws.' Maine was a pioneer in setting out to investigate law from this point of view and with the intention of showing that in jurisprudence, as in natural science, there were certain ascertainable laws of development. It is noticeable that parallel movements were begun simultaneously in law by Maine, whose 'Ancient Law' was published in 1861, and in biology by Darwin, whose 'Origin of Species' was published in 1859, 'the pregnant

conception of evolution being the link that binds them together.' 'He did nothing less than create the natural history of law' (Pollock).

'In the last fifteen or twenty years there has arisen a new power and a new influence in the world of thought, —not the direct but the indirect influence of the physical sciences, of the science of experiment and of observation. . . . It is now affirmed, and was felt long before it was affirmed, that the truth of history, if it exists, cannot differ from any other form of truth. . . . All truth, of whatever character, must conform to the same conditions, so that, if indeed history be true, it must teach that which every other science teaches,— continuous sequence, inflexible order, and eternal law.' ('Village Communities,' p. 266.)

(*b*) It is based on the historical and comparative methods (*cf.* p. 129 for three kinds of evidence).

Hitherto the method largely employed in historical investigation was the 'deductive' or '*a priori*' method, which started from a hypothesis which seemed inherently probable, and from this conclusions were deduced which seemed to square with known facts (*cf.*, for example, Locke's theory of a social contract, a hypothesis which seemed satisfactorily to account for the development of a system of government by consent). This has been called 'arguing from the unknown to the known.' The much safer 'inductive' or 'historical' method—'arguing from the known to the unknown'—implies the basing of the argument as far as possible on verifiable historical facts and their results, and from them drawing a conclusion on the principle that like causes produce in similar circumstances like effects, and that 'what is true of certain individuals of a class is true of the whole class' (J. S. Mill). The comparative method is an extension of this. 'The discovery of the comparative method marks as important an epoch as the Renaissance' (Freeman).

Maine was a follower of Savigny, the German jurist (1779—1861), who was a pioneer in the use of the historical method. 'Maine conceived his whole literary

career as a constant struggle against pure abstractions and *a priori* assumptions' (Vinogradoff); *cf.* p. 3, 'The enquiries of the jurist—jurisprudence.'

(*c*) Due importance is attached to the influence of national character and traditions.

This is especially characteristic of England, which is always inclined to believe in development in law and politics being organic rather than due to artificial change from outside. This organic development is what Maine tried to trace.

Maine, criticising Montesquieu, refers to 'the inherited qualities of the race, those qualities which each generation receives from its predecessors and transmits but slightly altered to the generation which follows it. . . . The truth is that the stable part of our mental, moral and physical constitution is the largest part of it' (p. 126).

'The greater part of the social and intellectual structure of a nation is bequeathed to it by former generations,' 'unconscious tradition is perhaps the most potent agent in historical life,' 'the margin of change is surprisingly small, and progressive nations quite exceptional' (Vinogradoff: 'The Teaching of Sir Henry Maine,' p. 9).

(*d*) It contains a number of brilliant generalisations, for which Maine had a sort of genius.

'His works are full of generalisations which are as remarkable for their clearness and sobriety as for their intrinsic probability, and which were reached, not by any very elaborate study of detailed evidence, but by a kind of intuition' (*Saturday Review*, February 11th, 1888).

On the other hand, though the book is the product of considerable learning, and is unprejudiced by the desire to prove a case, it must not be judged as though it professed to be an exhaustive study of details. Many of the conclusions are valuable in themselves, but it is the method more than the matter which makes it a

standard work. Maine had neither the health nor the inclination to produce a specialised critical monograph, and if he had done so, much of it by now would have been necessarily out-of-date. As it is, a certain number of the conclusions require revision, but this rarely affects the main argument and in no way seriously detracts from the real value of the book. Such criticism as is necessary is due to investigations in which an extended use has been made of the very methods Maine initiated (*cf.* Pollock: 'Oxford Lectures and other Discourses,' pp. 152-4).

Aims of the Book.

Maine, in 'Ancient Law,' seems to have two chief aims in view:

(1) To show the general development of law and legal ideas,—an attempt 'not surpassed or equalled as a general survey of the ground.' This has been summarised thus by Prof. Vinogradoff: 'First, personal commands and judicial decisions by patriarchal rulers; then customary law expounded and applied by a social and military aristocracy; thirdly, the fixation of these customs in codes as the result of social conflicts; next, the gradual modification of strict archaic law by help of fiction, primitive equity, and positive legislation; later on the rise of general jurisprudence in connexion with the spread of international intercourse and philosophical theories, ultimately scientific jurisprudence, the advent of which has been much delayed by chance influences' ('The Teaching of Sir Henry Maine,' pp. 16-17).

(2) To prove thereby the value of the historical and comparative methods in ascertaining facts and establishing general laws. It 'will ever stand as a monument of creative thought and an incentive to further investigations.'

MAINE'S 'ANCIENT LAW'

To study the development of law *a priori* conjectures are useless; in order to avoid mistaken theories based on unsound foundations, it is necessary to go to historical examples.

Leaving out of account (as Maine practically does, *cf.* p. 129-30) modern investigations among primitive peoples, the earliest evidence available is the Homeric poems.

Their principal value is:

(*a*) They give an account of contemporary society familiar to the writer, though under the guise of history of the past.

(*b*) They are of the nature of incidental and unconscious evidence, and therefore more trustworthy than the evidence of a student with preconceived ideas.

In Homer, law as a system is unknown, *νόμος* never occurring; the germs of law are seen only in isolated judgments or dooms, called *θέμιστες*.

Themis in Homer means

(1) The divine agent who inspires the king sitting as a judge.

(2) The inspired judgment given by the king.

Maine says that 'Kings are spoken of as if they had a store of themistes ready to hand for use,' and incorrectly concludes that these isolated judgments, owing to the recurrence of similar circumstances, crystallised into custom. Really the true conclusion to be drawn from the very fact stated here by Maine is that custom was anterior to judgments, and its existence accounts for judges having 'themistes ready to hand for use.' (*cf.* Maine's later admission, Pref. to 5th Edition, and 'Early Law and Custom,' p. 163. 'These sentences or *θέμιστες*. . . . are doubtless drawn from pre-

existing custom or usage, but the notion is that they are conceived by the King spontaneously or through divine prompting.') Thus also δίκη is not, as Maine thinks, a semi-crystallised form of θέμιστες, but the source or foundation of θέμιστες themselves.

The First Period then in patriarchal society (which is where Maine begins) is 'Heroic' Kingship, the only law consisting in judgments pronounced by the King, based on pre-existent custom.

The Second Period is that of oligarchies, the repositories of traditional law.

> [The revolution came about by the Kings becoming merely ornamental (*cf.* Archon Basileus, Rex Sacrificulus) and being superseded by privileged families previously forming the King's council, who assumed military and political power. In the East the priestly element gained strength and the King, always in primitive times a semi-religious official, re-appeared under the check of a priestly class as a religious and political figure-head; p. 10, 'With these differences—family of nations.']

This period is not, as Maine thinks, the 'period of customary law' any more than the last; it is the assumption by the oligarchy of the position of the King, *viz.* the claim to an exclusive knowledge of the laws and customs,—called by Maine the only 'true unwritten law.' A similar position was assumed by the earlier English judges, but as soon as courts began to found decisions on recorded judgments, English case-law ceased to be, in the literal sense, unwritten. p. 12, 'The elder English judges—written in a different way.'

The Third Period is that of popular movements and the production of codes, claimed from the oligarchies as a result of the invention of writing and as a check upon their abuse of their monopoly of legal knowledge (*cf.* Laws of Moses, XII Tables, Code of Solon, Code of Draco, Laws of Manu, Laws of Ine).

> *N.B.*—Many nations owe their law largely to the XII Tables, but Maine tended to exaggerate

the importance of Roman law, because he was endeavouring to promote its study in England. The XII Tables 'did not purport to include the whole of the recognised customary law'; and they 'were no mere consolidation, but a reforming code' (Sir F. Pollock).

The important question is at what point in its development a state obtained a code, for this largely influenced its subsequent legal development. Primitive society creates customs which result from observation of what is expedient and most suitable to its requirements. Later there is a danger of a tendency on the part of those who do not understand the reason for these customs to create others based solely on a superficial resemblance to them. 'Usage which is reasonable generates usage which is unreasonable. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy' (p. 17).

For various reasons—one being that the priestly oligarchies were more powerful than others and were able to cling to their power—Eastern nations obtained codes relatively later than Western, and even when obtained the laws of Manu (*e.g.*) were not the stereotyping of the Hindoo customs, but that of the customs which the priests wished observed. Thus when the Hindoo code was made the stage of engrafting meaningless usages had already been reached, while the XII Tables, belonging to a *relatively* earlier period, stereotyped laws and usages still wholesome and unspoilt. 'The fate of the Hindoo law is the measure of the value of the Roman code' (p. 17).

N.B.—This example has been criticised, and it has been suggested that the XII Tables 'went near to stereotype an archaic and formalist procedure' which necessitated evasions through Fictions and Equity (see Pollock's Note, pp. 24-5). In any case, the main argument is not invalidated.

When a society has reached the era of codes, unconscious legal development ceases. At this point

societies divide into two types, Stationary and Progressive. In spite of a natural inclination to believe the contrary it must be realised 'that the stationary condition of the human race is the rule, the progressive the exception' (p. 28). Progressive societies only are to be dealt with here.

'Social necessities and social opinion are always more or less in advance of law.' The gap between them has to be consciously closed; 'the greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed' (p. 29). This is done by means of Fictions, Equity, and Legislation, and they habitually appear in this order.

Legal Fiction (in present sense) means 'any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified' (p. 30).

E.g. Case Law, Responsa Prudentium, Adoption, &c.

Equity is 'any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles' (p. 32).

E.g. Chancery Law, Praetorian Edict, &c.

Legislation (in present special sense) means the enactments of a legislature (whether monarchical or parliamentary) which is the assumed organ of the entire society, the obligatory force of which is derived from the authority of an external body and is independent of their principles (pp. 33-4).

E.g. Parliamentary statutes, Proclamations with the force of law, &c.

Legal Fictions.

(*a*) *Case Law.* In England there is in theory some existing law, if it can be found, which covers any case that may arise, and a judge is bound to give a decision in accordance with such law. In reality sets of circumstances appear to which no law is precisely applicable,

and the judge's decision, which he cannot avoid giving, then creates a new precedent which henceforth has legal force. The fiction is that the law remains the same, being only alterable by Parliament; the fact is that the judge has changed it.

N.B.—The name itself, Case Law, almost implies the recognition of the fact that the courts have the power of modifying the law, but this power differs from that of the legislature in degree as well as in mode of action, in that, while the latter can change the law at will, the former must conform to certain principles and to all existing precedents.

(*b*) *Responsa Prudentium.* Owing to the inadequacy of the XII Tables to provide for all contingencies of later times, interpretations and applications of them by eminent jurisconsults became recognised as of almost binding force, and even further explanations of such interpretations. Pupils took down the replies of great jurisconsults to their clients, and even obtained their opinion on hypothetical cases. The binding force of such opinions depended on the prestige of the particular lawyer, but later Augustus gave the right to certain definite lawyers only to give binding decisions, which put an end to the spontaneous and free development of the system.

Note the difference between the English and Roman parallels:

(1) The English Bench, the Roman Bar, thus modified the law, there being at Rome practically no permanent Bench.

(2) The English judge has to decide only on the actual points before him, and seldom will go any further than the questions specifically raised in the case; the Roman jurisconsult could multiply groups of circumstances at pleasure, and hence tended to lay down principles, which gave much value and unity to Roman jurisprudence. Roman law is thus based largely on general principles; English law rather on individual precedents.

Equity.

(*a*) *Chancery Law.* Chancery Law, which was explained as flowing from the King's conscience, and therefore administered by his conscience-keeper, the Chancellor, was used to mitigate the rigour of the Civil Law where it did not appear to be justly applicable to particular cases. It was therefore elastic, but both Chancery Law and Equity Law of Rome in time began to assume as definite and rigid a form as the Civil Law. It is based on 'principles supposed to be entitled by their intrinsic superiority to supersede the older law' (p. 48). Chancery jurisprudence was largely borrowed by the ecclesiastical Chancellors from the Canon Law, and later from the Roman Corpus Iuris Civilis. Each Chancellor added to it by his decisions till Lord Eldon (d. 1838), who endeavoured to harmonise and arrange it instead of enlarging it (p. 70).

(*b*) *Praetorian Edict.* The Praetor was the Roman Chief Justice after the expulsion of the Tarquins. Owing to the number of resident foreigners in Rome the question arose as to what law to apply to cases in which they were involved, as Roman law would be inapplicable to those of different race and religion. Roman jurists therefore set about to discover and apply the elements of law in common use among all the neighbouring peoples, or at any rate those from whom litigants mostly came. This code was employed where one or more foreigners were concerned, later in the special court of the Praetor Peregrinus, under the name of the Ius Gentium.

N.B.—Perhaps Maine leaves the impression that this process was one of more deliberate codification than it really was; probably it would at first amount to little more than a judge with a case before him welcoming the discovery of some customary rule applicable to the case, which was familiar to the tribes from which the litigants came, and therefore applying it, this decision in turn becoming a precedent which would save his successor trouble in a similar case. It has, too,

been suggested (Pollock's Note, pp. 74-5) that there was most probably already in existence among traders an informal code which the Roman judge would adopt, much as English law took over and recognised the mediæval law merchant (*cf.* also Bryce's 'Studies in History and Jurisprudence,' Vol. II, pp. 132-3).

Every magistrate whose duties had any tendency to expand had to publish on entering office an edict setting forth the manner in which he intended to administer his department. The Praetor therefore published an edict stating the customs which he had observed to be common to the various foreign litigants, by which he intended to bind himself. For convenience' sake he habitually published his predecessor's edict with additions, which was hence known as the *Edictum Perpetuum.* This enlargement was stopped by Julianus, under Hadrian, and the now stereotyped *Edictum Perpetuum* is hence often known as the Edict of Julianus.

Note :—

(i) Whereas the Praetor made the alteration in the law of Equity on entering office, the alteration made by an English Chancellor is only known when he leaves office and his decisions can be summarised.

(ii) From Hadrian (117—138 A.D.) to Alexander Severus (222—235 A.D.) all writings of jurisconsults were practically commentaries on the now permanent Edict ; in the latter reign such writings cease, and Roman equity ceases to expand and becomes rigid and stereotyped just as English equity did under Lord Eldon.

The Romans, *if anything,* tended, though certainly less than Maine implies, to look down on the Ius Gentium, while in modern times special respect is inclined to be paid to equity, of which the Ius Gentium was the Roman form. This transition is due to the importation of the Greek idea of Ius Naturale, and to its identification with Ius Gentium and Aequitas.

The Law of Nature.

A distinction had long been recognised between the general principles of justice which are the same for all the world and all ages—Aristotle's τὸ φυσικὸν δικαῖον, and the applications of them made by positive law and varying among different peoples—Aristotle's τὸ νομικὸν δικαῖον. The former, *e.g.* would forbid one man doing injury to another, but it would be differently applied in different countries to the case of a man committing homicide in self-defence (*cf.* Pollock's Note, pp. 73-4). Under the former might be classed the Ius Gentium.

There was a Greek theory of a Law of Nature—nature being regarded as the manifestation of some single principle, and essentially characterised by simplicity, symmetry and general laws. This law of nature had existed vaguely in an ideal past from which men had fallen, though expressions are often used which show that the law of nature was supposed to be still existing, and its relation to the poetic golden age of the past was not very clearly grasped. The duty of man, therefore, according to many Greek philosophers, notably the Stoics, was to return as far as possible to this state, and 'to live according to nature.' On the Roman conquest of Greece (B.C. 149) the conservative element at Rome, which was usually the legal, assimilated this doctrine.

Now such a conception of nature suggested the same sort of ideas of equality, simplicity, symmetry and levelling of irregularities as under the name of Aequitas, characterised the Ius Gentium, the simple elements of law found to be common to all observable nations. Hence the idea arose among Roman jurisconsults that the Ius Gentium must represent as nearly as possible the residuum of the once universal code of nature, and that it was the Praetor's duty to try to supersede the Civil Law by the Edict.

In early society the Law of Nature was invaluable as a protection against two great dangers of primitive law:

(1) (Found in Greece, but rare elsewhere) The inclination to develop law too rapidly, and to

disregard too early its rigidity. 'One of the rarest qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal' (p. 81). Against this danger the conception of a 'system which ought gradually to absorb civil laws, without superseding them so long as they remain unrepealed,' is a great protection.

(2) The tendency to cling to some ancient code in spite of defects. The belief in a Law of Nature gives a chance of amending such a code in conformity with this ideal. *Cf.* p. 83, 'I know—usual one.'

The modern history of the Law of Nature is best exemplified in France. Almost throughout French history the lawyers were a privileged class, with immense influence over the political and constitutional development of the country, due largely to the mediæval love of general formulas and superstitious respect for written texts apart from their intrinsic value (*cf.* influence of the Forged Decretals). Early they were attracted by the idealism and by the simplicity and symmetry of the Roman Law of Nature. It happened that French jurisprudence was peculiarly lacking in simplicity and uniformity, and the lawyers seemed to regard these defects as inevitable (*cf. pays de droit écrit* and *pays de droit coutumier*). They therefore adopted boldly the Law of Nature as a way of reconciling their own ideals with the inevitable circumstances of their country It became the idol of the lawyers, and, passing through the crisis of the publication of Montesquieu's writings, based on the historical method, which ought to have proved fatal to it, it became the centre of the new doctrines of the people enunciated by Rousseau, and popularised in America by the publicists who supported the movement towards independence.

The essential difference between the ancient and modern conception was that the Romans wished only

to bring out as far as possible such elements in the Civil Law as seemed survivals of the Law of Nature, and gradually to assimilate the rest to it. Rousseau and his followers thought that the Civil Law could be abolished, and the Law of Nature set up wholesale to take its place. Hence they laid more stress than the Romans on the State of Nature, the period or system which they conceived to have been governed by the Ius Naturale. *cf.* pp. 92-3.

The Law of Nature attained its maximum of political importance at the French Revolution, and in spite of its defects was able to hold its own, because

(1) It became popular, and to the uneducated its essential weaknesses were not obvious.

(2) The revolutionaries refused to accept any evidence from biblical antiquities, while the Old Testament was one of the few documents available which would have shown the superiority of the historical method.

Direct results of the prevalence of the theory were :

(*a*) A growing preference for *a priori* reasoning, which always appeals to the indolent or the imaginative thinker.

(*b*) An anarchic tendency to revolt against positive law in reliance on abstract and idealist theories.

(*c*) The rise of the idea, prominent in the French Revolution and in Jefferson's Declaration of Independence, that 'all men are equal,' stated by the Antonine jurists as a juridical axiom, but adopted by their modern successors as a social ideal. pp. 96-7, 'That all men are equal—ought to be equal.'

(*d*) The creation, due mainly to Grotius, of International Law, founded on Ius Naturae as identified with Ius Gentium.

This International Law rested on the theory that where there was no common ruler and lawgiver, the

only law binding must be that of Nature, the relations of independent states to each other being compared with those of man to man in the natural state before civil governments were instituted.

To make this applicable, it is necessary to assume—

(1) That all states are to be regarded as equal.

(2) That sovereignty is territorial.

(3) That sovereigns *inter se* are not paramount, but absolute owners of the state's territory.

These last two assumptions are necessary because much of the international code was pure Roman property law. The necessity for the third is proved, as Sir F. Pollock has pointed out (p. 121), by the difficulties found in solving by international law questions regarding districts which are only 'spheres of influence.'

Therefore until feudalism had brought about the territorial idea of sovereignty, and until the theory of a state-system under an Imperial suzerain had exploded, this system could not have gained recognition; while on the other hand with the schism of the Reformation the idea of an Imperial or Papal mediator necessarily came to an end, and some substitute was needed for it which was elaborated in Grotius' 'De Iure Belli et Pacis' (1583-1645), pp. 99-114.

The Law of Nature is an unhistorical invention, but it has influenced nearly every political philosopher of modern days. Some conjectural theory of a natural state, with a theory of legal development constructed on it (*e.g.* Grotius, Hobbes, Locke, &c.), has been the basis of most theories of law.

There are two notable exceptions of theories which employ more or less the historical method:

(1) Montesquieu (1689-1755). But he evolves no general laws, because he regards the development of man and society as almost wholly depending on environment. 'He underrates the stability of human nature,' and 'pays little or no regard to the inherited qualities of the race' (p. 126).

(2) Bentham (1748-1832). But he underrates the force of tradition and custom, and reduces the development of society to the statement that 'societies modify their laws according to modification of their views of general expediency,' without, however, accounting for the modifications in these views (p. 127) unless his meaning is that they are due rather to observation and experience than to respect for tradition and custom.

Conjectures then are useless, and recourse must be had to the historical method, to discover, with a view to establishing laws of development, the facts of early society.

There are three principal kinds of evidence :

1. Accounts by contemporary observers of civilisations less advanced than their own ; *e.g.* the Germania of Tacitus, the writings of Messrs. Spencer, Gillen and Morgan, &c.

This has been much neglected owing to the contempt of the civilised for the barbarous.

2. The records which particular races have preserved concerning their primitive history ; *e.g.* the Anglo-Saxon Chronicle.

Such traditions have been thought to be coloured by pride of race or modified by the sentiments of a newer age, *e.g.* Malory's picture of the Arthurian court.

3. Ancient law.

This has rarely suffered from modification, as it has been preserved and obeyed by those who did not understand it, for the very reason that it was old. Where systems of law are suspected as of doubtful authenticity, the comparative study of several systems makes it possible to discriminate between those which are genuinely archaic and those which are additions.

Of these three the first is really of immense value, but it was scarcely accessible to Maine, and therefore

he concludes that the evidence of comparative jurisprudence is the safest, and employs it.

N.B.—In broad generalisations such as Maine indulges in it has always to be borne in mind that no one would profess to lay down a definite rule of progress through various stages, and to assume that every society passed through them all. In such cases it must be taken that the meaning is that the order was never reversed, though some societies may have skipped some stages, for it has been pointed out that 'deliberate imitation was earlier, easier, and commoner than scholars formerly supposed' (Pollock's Note, p. 179). 'We are learning that the attempt to construct a normal programme for all portions of mankind is idle and unscientific' (Maitland, 'Domesday Book and Beyond,' p. 345). This warning applies equally to the study of the first-mentioned kind of evidence, and is the chief argument of those who distrust it. The following account would be more consistently true if definitely limited to the Indo-European family (see note K).

The evidence of comparative jurisprudence, taken alone, produces the conclusion that the Patriarchal stage is the earliest phase of society, *i.e.* that in which absolute power belongs to the eldest male ascendant, who is the representative, as well as the ruler, of the family. Society expands as the family expands, and separate states are formed as families separate (*cf.* in Biblical history Jacob and Esau separating, and the sons of Israel staying together and forming one nation).

N.B.—Maine here almost certainly begins too late, for there are forms of society to all appearances more primitive than the Patriarchal, but the details of them are to some extent unknown, and the theories as to their being totemistic, matriarchal, &c., are controversial. The further question remains as to whether they were universal or exceptional.

In this society the family, not the individual, is the unit, and thus ancient law is adapted to a system of small independent corporations.

Thus,

(*a*) It is scanty because supplemented by patriarchal commands.

(*b*) It is ceremonious, because it is of the nature of law between independent communities—like international law—unlike 'the quick play of intercourse between individuals.'

(*c*) It regards the units of society as perpetual, because the unit is the family, and the family, being a corporation, never dies.

The corporate idea is brought out (*e.g.*) by the recognition of guilt not in the individual but in the entire group.

> For transition from idea of corporate to idea of individual responsibility *cf.* the Anglo-Saxon blood-feud, and also the Greek hereditary curse which involved all a man's descendants in liability to commit crimes which resulted in punishment, thus reconciling the responsibility of the family 'with the newer phase of thought which limited the consequences of crime to the person of the actual delinquent' (p. 136).

Throughout the idea of kinship is predominant as the basis of the state, whether the older theory is correct that the group of families produced the gens, the group of gentes the tribe, and the group of tribes the commonwealth, or the more recent theory that the larger group belongs to the earliest stage out of which individual families afterwards emerged. But from early times the family was recruited by the legal fiction of adoption, no other expedient for increasing the size of the society being conceived of as possible. Similarly the coalescence of tribes or states was made possible by the same expedient, the fiction of kinship. Without this no primitive group could have absorbed another,

except on the basis of subjection. This process is found in most early societies (p. 138).

At some point in social development, when societies ceased to recruit themselves thus, and a new population was absorbed into the society, claiming no community of kinship, the inevitable result was the rise of an aristocracy of blood. The counter claim to equal rights in the state which would then be raised by the inferiors would be based on the principle of local contiguity, the principle of modern society.

Patria Potestas.

So long as society is based upon kinship the family, obedient to the rule of its head, is the unit, the family differing from that of to-day in that

(1) It includes, with in every way equal rights, adopted members.

(2) It excludes all not subject to the power of the father.

(*N.B.*—This rule was probably common, but the Roman Patria Potestas is the clearest example to take.)

The Patria Potestas concerned the children's

(*a*) Persons.

(*b*) Property.

(*a*) With regard to the former, the eldest male ascendant originally had power of life and death, of selling, marrying or divorcing children, the son differing from a slave only in his power of one day himself wielding a Patria Potestas. But this applied only to Private Law, *i.e.* for fulfilling his duties to the state, &c. the son was as free as the father. For reason of this, see pp. 143-4.

This gradually was softened down into the modern system of parental control (except in the case of children under age) owing to various causes, one doubtless being the increased absence from home of sons, owing to wars and the increasing occupation of distant pro-

vinces, &c. Signs of a desire to mitigate the paternal power are seen even before the XII Tables (p. 147).

(*b*) With regard to the latter, the fullest rights were claimed and exercised at least till the beginning of the empire. The parent held all property, alike of himself and of his children, 'in a representative rather than a proprietary character,' without any of the children's liabilities, it being essentially characteristic of the early family 'that its members brought their earnings of all kinds into the common stock, while they were unable to bind it by improvident or individual engagements' (p. 148).

Relaxation of power over property took the form, analogous to the allowing a semi-independent ownership of savings to slaves called 'peculium,' of excepting from paternal control earnings as soldiers or as civil servants, called respectively 'castrense peculium' and 'quasi-castrense peculium.' Subsequent laws further relaxed the rules concerning property, but even then the Roman Patria Potestas over property was remarkably stringent, and in the meantime the system had been spread throughout the world by Caracalla's granting of Roman citizenship to all provincials in 212 A.D.

For an incidental result of this *cf.* p. 151, 'However—the world.'

Two reasons may be given for this stringency of the Law of Property:

(1) Perhaps it was due to the idea that the wife was the property of the husband, and *a fortiori* her children and their property were the same. This would partly explain the limitation of the Patria Potestas to the Ius Privatum (Pollock's Note, p. 181).

(2) More probably the explanation is to be found in the idea of unity in the eye of the law between all members of a family. The unit of society with which law and government had to deal was not the individual but the family. Thus all the property of individual members belonged to the family as a

> unit, of which the representative in relations with the government was the father. As corporations never die, the entire property passed on one representative's death to the new representative, as part of the legal mantle which fell entire upon the heir. Hence it was essential that all individual property should be united in the hands of the family representative (p. 198).

The test of relationship under this system was not descent from a common ancestor, but subjection to a common Patria Potestas. Therefore the patriarchal family, while including adopted members, excluded many whom we count in a family, *viz.*, all those not subject to the common Patria Potestas, notably

(*a*) Emancipated sons.

(*b*) Married daughters and their descendants.

The ordinary modern form of relationship is called Cognatic; the kind which is based simply on obedience to a common Patria Potestas is called Agnatic. p. 155 'Where the Potestas begins—family.'

To discover the members of the primitive (agnatic) family, it is necessary to stop in tracing descent in a genealogical tree at a woman's name, as (if married) she and her descendants will not be included in the family. '*Mulier est finis familiae.*' The simple reason for this is that a married woman and her children pass under the Patria Potestas of her husband, not of her father.

Agnation was at Rome the primitive rule, but the Praetors early superseded it by cognation. Several traces of it, however, may still be found; *e.g.*,

(*a*) The Hindoo reckoning of kinship is often agnatic, women's names being altogether omitted in genealogies.

(*b*) Exclusion of women by Salic Law.

(*c*) The Norman rule that uterine (same mother) half-brothers were not heirs to one another's property though consanguineous (same father) were so, the former not being agnatic relations to one

another at all. This rule was transplanted to England, and applied to all half-brothers till recently, through a misunderstanding of its origin.

It is out of this agnatic family, held together by the Patria Potestas, that the whole Law of Persons can be evolved :

Three examples :—

1. The perpetual guardianship of women is due to the fact that under the agnatic system a woman can never possess a Patria Potestas, and must, therefore, always be under that of somebody else (p. 158). On similar grounds a male orphan's guardianship under Roman law continues, not until he may be considered able to know his own interests, but only until he is old enough to be a father himself. (pp. 164-5.)

2. The slave was to some extent recognised as a member of the family—he was included in the *familia*—being at times even able to inherit the Patria Potestas ; he was considered as connected with his master by the same tie as the son with his father, because no other relationship but that of the family was intelligible to men in that stage (*cf.* incidental results of this theory, pp. 169-70).

3. Testamentary Law has its origin in the idea that, as the family is a corporation and never dies, therefore the representative of the family is a corporation sole and never dies, his legal existence being continued in the person of his heir. Hence the insistence on the completeness of the universal succession. This idea survived the fact that gave it birth, *viz.* that the family, not the individual, was the unit within the state.

p. 191, 'A will or testament'—p. 192, 'rights and duties.'

p. 193, 'A universal succession'—p. 194, 'in the recipient.'

p. 197, 'Contrasted with'—p. 198, 'slightly modified name.'

p. 200, 'Now in the older theory'—p. 201, 'his co-heirs.'

p. 199, 'There seems little question—physical extinction.'

The gradual trend of development from this primitive predominance of the family is towards emancipating the individual, *e.g.* sons 'under power' but of age and position (by Castrense Peculium, p. 149), and women (by evasion of the law, p. 159), and matters are taken from the domestic sphere into public. Still later (*e.g.* in modern days) the son of age gains complete independence of the father, and unmarried women of their blood relations, and slavery gives place to paid service —in short, the relations of man to man cease to be based on *status* and are regulated by free *contract* (p. 174).

> *N.B.*—There are some exceptions to this statement, some of which it is not easy to explain, as in all cases modern law demonstrably does not allow absolutely free contract, *e.g.* in marriage (*cf.* Pollock's Note L); but in the main it is true, many of the apparent exceptions, *e.g.* children under age, lunatics, &c., being due to the idea that such persons are without the essential qualities necessary for knowing their own interests, and therefore incompetent to form contracts (p. 173).

But in this emancipation from primitive family ties, opinion was ahead of law (*cf.* p. 29). An example of this is found in regard to the law of testaments or wills, in the deep-rooted and lasting horror on the part of the Romans of the idea of intestacy. In fact, the law of intestate succession maintained views of a more primitive period which public opinion had outrun.

The power of making a will was originally valued, not for the sake of disinheriting natural heirs, but for giving a share of the inheritance to blood relations excluded by the laws of intestate succession (pp. 233-4).

The old Civil Law provided for the succession in the following order :—

1. Unemancipated children.
2. Other agnatic relations.
3. The Gentiles, or all Romans who chanced to bear the same Gentile name.

The whole system, that is to say, was based on the idea of the agnatic family (pp. 211, 236), while public opinion was beginning more and more to recognise cognatic relationship.

The Praetor gradually introduced intermediate grades, but before these modifications were made, a man's emancipated—and therefore probably favourite—children were disinherited, as also his married daughter and her descendants, and his property might pass to people who were only by a fiction related to him at all. While the law regarding emancipation had remained the same, it had become customary to use emancipation as a favour instead of the reverse. Hence the hatred of the idea of dying without making a will which should bring the action of the law into conformity with current ideas ; and this traditional dislike of intestate succession remained after the Praetors had so much modified the law that in Justinian's code it differs very little from what is usually accepted as reasonable in modern times.

Mediæval wills were generally restricted to movable property, and a portion was usually at first reserved by law for the widow and children. This custom disappeared when a restriction began to be put upon succession to real property under feudalism by the rule of primogeniture, which 'practically disinherited all the children in favour of one' (p. 240).

What is the origin of primogeniture ?

(*cf.* Evelyn Cecil : 'Primogeniture,' pp. 14-23).

Primogeniture is essentially of feudal origin, and feudalism is derived from two legal systems :

(*a*) The law of the Roman provincials.
(*b*) The archaic customs of barbarians.

But a difficulty arises when it is realised that primogeniture as applied to property was unknown to both these systems. Joint ownership was a characteristic of the early Roman law of succession and of other jurisprudence of the patriarchal period:

E.g. Universal succession of a group of co-heirs in Roman Law.
Joint ownership of children with their father, and a right to demand partition, under Hindoo law (pp. 241-2).

In the case of Teutonic barbarians also primogeniture is known not to have been a primitive custom. p. 243, 'The more clearly—Roman Empire.'

The barbarian chiefs who invaded the Roman Empire were in the habit of making grants of conquered land, called *beneficia*, to their supporters. These were originally held for life at the most, but the tendency was to extort if possible the right of succession, and 'benefices' were definitely made hereditary by Charles the Bald in 877, and developed gradually into the hereditary fiefs of the feudal system. The method of succession still depended on the terms of the grant, but with the expansion of feudalism the practice of primogeniture rapidly spread. Why? Though the practice was found convenient for both lord and vassal, this does not account for its origin. Perhaps the explanation is this:

There are signs of an unknown stage of social development anterior to the patriarchal period, in which the family was an independent society (not yet a mere *imperium in imperio*) and was ruled by the eldest member. *E.g.*

(1) Hindoo succession by primogeniture to political office, though not to the possession of property.

(2) Succession by primogeniture to the chieftainship of Celtic clans (pp. 247-8).

This idea may have survived among the barbarians, or may have been naturally reverted to during the

period of weak monarchies which succeeded the Carlovingian empire, when property needed a strong hand to hold it, *i.e.* a number of small semi-self-governing feudal communities may have grown up, the succession to the chieftainship of which followed the rule of primogeniture. 'The lord with his vassals . . . may be considered as a patriarchal household, recruited, not as in the primitive times by Adoption, but by Infeudation, and to such a confederacy, succession by primogeniture was a source of strength and durability' (p. 249). 'I regard the early feudal confederacies as descended from an archaic form of the family, and as wearing a strong resemblance to it' (p. 250).

Such chieftainship would be held in a representative character only, and the chief who had control of the family possessions would have obligations of a trustee character recognised only by unwritten law. But in mature jurisprudence such obligations would not be recognised by the courts, and representative ownership would soon pass into absolute proprietary ownership (p. 251).

> *N.B.*—In some communities (*e.g.* some Celtic and Indian) the eldest surviving heir of the first generation succeeds a man in preference to the eldest member of the eldest line. This is probably due merely to the convenience of having a chieftain who is more likely to be of full age (p. 254). Where polygamy is practised, the right is sometimes exercised of naming a successor; *cf.* Isaac's blessing of his sons.

While strict law recognised only the group founded on kinship, and general opinion began to regard the individual as an independent unit in the state, the former was brought into line with the latter by means of the Law of Nature (*cf.* p. 29).

This may be shown through the history of the early law of property. Joint ownership appears ordinarily to have been the rule, individual ownership being usually a modern development. p. 271, 'It is more than —of kindred.'

Examples :—

(*a*) Indian Village Communities :

There is one type of Indian Village Community in which property is held in common by all members of the family, each having a right to an equal share on partition. Owing, however, to reasons of convenience, property is not ordinarily divided, but administered by the eldest male agnate, who approaches becoming proprietor. The community consists of a clan—created largely by fiction—of co-proprietors, and if one of its families becomes 'extinct its share returns to the common stock' (*cf.* the Roman gens, the members of which assumed relationship and inherited in the last resort the property of an extinct line, p. 211). To this community, based upon property and kinship (or feigned kinship), new members are gradually admitted on buying a share of the property, and from it members can depart by selling their share with the consent of the brotherhood. Collective ownership thus remains, but with a constant tendency towards becoming individual. p. 275, 'The rights of the landholders—common stock.'

(*b*) Russian Village Communities :

In the Russian Village property is held in common by members nominally related by blood, but each has a right to enjoy temporarily the individual use of a share, while at fixed intervals such individual ownerships are extinguished and the property is again pooled, gradually to be redistributed again. The development of joint into individual ownership is thus constantly going on but is being constantly checked. The characteristics are very similar to those of the type of Indian village described above (pp. 277-8).

(*c*) Roman Law of Occupancy :

Roman jurisconsults asserted that in the natural state all property (land, fruits of the earth, &c.) was considered common, till the individual, by

'occupation' or use, appropriated first temporarily then permanently portions of it. Hence 'occupation' was considered a 'natural' means of acquiring property at the moment without an owner, *e.g.* treasure trove, a defeated enemy's country, a newly discovered land (pp. 263-5).

This unhistorical explanation was devised to account for the undoubted fact that collective ownership was developing into individual, just as the individual was emerging out of the family, and in order to reconcile law with fact and general opinion.

In a society in which the group was the unit there was little room for individual initiative; hence the province of 'imperative law,' *i.e.* the fixed commands of the state or its subordinate representatives, was very wide. p. 325, 'The point which'—p. 326, 'room for contract.'

Property therefore tended to become inalienable, acquired property had to be handed over to the recognised unit, the family, and every detail of any individual transaction was laid down. Since it was a matter of transactions between groups, and of rare occurrence, ancient law partakes of the nature of international law, and is very ceremonious (p. 282). As the individual emerged from the group and the individual right of ownership from collective ownership, greater freedom had to be conceded by law, the right of the individual to make contracts had to be recognised, and ceremonies simplified till mutual trust was substituted for the exact performance of specified rites. 'The positive duty resulting from one man's reliance on the word of another is among the slowest conquests of advancing civilisation' (p. 326).

Contract.

Contract appeared only at a comparatively late point in legal development, and its evolution has been gradual. The account of its actual origin here given by Maine, and apparently suggested by Savigny, is at

the least disputable, but, as in most other cases, the main argument as to the modernity of contract is not thereby affected.

A mental engagement is called in Roman law a 'pact' or 'convention.' This had not the force of a contract, or *nexum*, till certain formalities had been fulfilled which added to the pact an 'obligation' (p. 336, 'A contract—naked'). Now a contract (*nexum*) giving a 'right availing against a single individual or group' is, strictly speaking, distinct from and opposed to a conveyance (*mancipatio*—though formerly the same word *nexum* was used, perhaps because the processes gone through were similar) giving proprietary 'right availing against all the world'; but, according to Maine, the contract was evolved out of the conveyance, and was, in fact, an 'incomplete conveyance' (p. 334). Thus:

> A conveyance was effected by one man handing over the thing to be sold and the other handing over the copper ingots with certain formalities, during which process the two parties were said to be *nexi* or bound together.
>
> In a later stage the money will not be paid on the spot, and while the seller will no longer be *nexus*, the buyer will still be *nexus*,—under an obligation.
>
> Later still neither side will actually deliver anything, and both parties will be *nexi*; they will have made not a conveyance, but a contract of sale, *nexum*. Thus Maine calls a contract in its origin an 'incomplete conveyance,' and accounts in this way for the severity of ancient law towards debtors, the suspense of payment being regarded as a special concession made by the creditor to the debtor. p. 334, 'When once we understand—deferred.'

A pact or convention does not become binding in consequence of any moral necessity, but because the law adds some formality which gives it an 'obligation' and makes it a contract. This obligation was supplied

in four different ways, and contracts were classified in Roman Law according to these four methods of supplying the obligation, and these appeared probably in the following chronological order :—

1. Verbal Contract : in which the convention became a contract by a form of words (*verba*) being gone through, namely, a special question and answer, or 'stipulation.' *Cf.* p. 340, 'It was the promisee '—p. 341, 'in itself binding.'

2. Literal Contract : in which the obligation was conferred by the written evidence of an entry (*literae*) in a ledger, &c.

3. Real Contract : in which proof that the thing (*res*) had been handed over by one person (*e.g.* in the case of a loan which a debtor had contracted to repay) was sufficient to bind the other.

N.B.—Here for the first time *moral* obligation appears to be recognised.

4. Consensual Contract : in which the mere agreement (*consensus*) of the two parties gave the necessary obligation and made the Convention a Contract.

N.B.—This was applicable only to sale, partnership, agency and hiring, four of the most common and necessary transactions.

For a general summary, see p. 349, 'We begin with—inward undertaking.'

Thus the contract, an engagement made up of a promise and of certain formalities, in which the formalities were the important part, and the circumstances in which the promise was made could not affect its validity if the formalities were adequate (*cf.* p. 327, 'That which the law arms—deception '), has developed into the modern idea by the 'mental engagement isolating itself amid the technicalities,' in which the former is the part of importance ; 'contracts are absorbed in pacts ' (pp. 327-8). With the appearance of the Consensual

Contract the stage has been reached of reliance upon a man's plighted word,—a very late development.

A genius for jurisprudence was the characteristic of Western Europe which inherited Roman traditions, just as a genius for metaphysics was that of Eastern Europe which inherited Greek traditions. Hence all thought in the West was much influenced by Roman law, and especially by its law of contract.

Now as the Consensual Contract was found common to other peoples it was at once classed as part of the Ius Gentium, and later assumed to be part of the Law of Nature and therefore of very early origin. Later philosophers, under the influence of Roman law, therefore, began to apply it to politics, and enunciated the theory of the Social Contract in a state of nature as a counterpoise to the theory of the Divine origin of Imperative Law (*cf.* Locke's answer to Filmer's 'Patriarcha,' which embodied the doctrine of Divine Right of Kings). The fact that contract is really a late development proves that the Social Contract theory is a violent anachronism. *Cf.* p. 325, 'The Troglodytes —obligations of contract.' The theory 'may be a convenient form for the expression of moral truths' (Whewell, quoted p. 357), but nothing more.

Again, as the influence of Roman law spread through Europe, Roman contract law took the place of more primitive custom in forming the new kind of society. Just as primitive society had consisted of communities based upon custom or kinship, *i.e.* status, the new feudal system arose out of Roman and barbaric law, consisting of similar communities now based largely upon an inherited contract between the owner of the soil and the feudal tenant. p. 372, 'The earliest social forms'—p. 373, 'true archaic communities.'

Criminal Law.

Archaic law has one almost universal characteristic, of which the absence of contract is an example, *viz.* the preponderance of criminal law and the small proportion of civil law. The XII Tables are a solitary

exception. 'The more archaic the code, the fuller and the minuter is its penal legislation' (p. 378).

Two main reasons :—

1. The natural violence of primitive society necessitates an ample penal code.

2. Far the greater part of modern civil law consists of the Law of Persons, the Law of Property, and the Law of Contract, none of which can find much scope when custom (*e.g.* Patria Potestas) determines the status of every man, and property belongs to the group, not the individual, and is almost inalienable. p. 378, 'Nine-tenths'—p. 379, 'ancient codes.'

Law of a criminal nature may be divided under three heads :—

(*a*) Law of 'Crimes' proper, or offences against the State.

(*b*) Law of 'Wrongs,' Torts or Delicts, or offences against the individual.

(*c*) Law of 'Sins,' or offences against God.

Of these three, the law of Crimes is the least common in ancient codes, for most offences which would be Crimes in modern law are regarded as Torts in ancient ; *e.g.* money compensation system for murder, theft, &c., in the Teutonic Law and the XII Tables. Sins were punished by the State not only in Christian codes but also in Greece and Rome ; *e.g.*, sacrilege, adultery, &c., at Athens, according to a special religious code administered by the Areopagus, and at Rome by Pontifical Law (p. 381, 'There were, therefore—criminal jurisprudence'). Crimes were also punished, but by a special legislative act for each individual case, exactly similar to any other enactment (*cf.* English Acts of Attainder), and therefore no criminal jurisprudence was needed.

Though the fact that a state official judged in early times, and inflicted fines as well as doing justice between the plaintiff and defendant, seems to show that the

State interfered and demanded compensation for itself when it thought itself wronged, the fine was really only payment to the judge for his services. This is shown by Roman law, in which all the formalities of a trial are a copy of what would probably happen if two men disputed and called in a passer-by to judge; the punishment, moreover, is made heavier in the case of a man taken in the act, on the same analogy (*cf.* pp. 384-5, and the trial scene on the Shield of Achilles, pp. 385-6). This then was an example of the law of Torts, not the law of Crimes. Thus probably the Anglo-Saxon 'wite' was originally payment for the services of the judge, while the 'wer' was the compensation paid to the wronged man. The development of the idea of the King's Peace and a fine for its breach is a later idea characteristic of true criminal jurisprudence (*cf.* Pollock's Note S).

The history of the origin of real Criminal Law falls into four periods:

1. When each individual crime is punished by a special act of the legislature.

2. When owing to the number of crimes the legislature delegates its powers in individual cases to special commissions.

3. When the legislature, without waiting for crimes to be committed, nominates periodically commissions to take cognisance of certain classes of crime when they arise.

4. When the legislature constitutes a permanent court for specified classes of crime, and in the law constituting it provides a means for its continuance by the filling up of vacancies.

The judicial arrangements at Athens point to this origin of the Courts, as 'Heliaea,' the name of the Athenian courts of justice, means 'an assembly,' and was originally the Popular Assembly in its judicial capacity, the Dikasteria being its sub-divisions. In Roman history all these phases of development are clearly illustrated (pp. 390-2).

1. Criminal jurisdiction was originally exercised by the Comitia under legislative forms.

2. The Comitia then began to delegate its judicial powers to commissions, called Quaestiones, the Quaestors being authorised to try specified individual cases.

3. Quaestiones were later appointed to try any cases which might arise of a certain kind, but the appointment was only for a limited period (*e.g.*, Quaestores Parricidii, &c.). This attempt at classification of crimes marks a step forward in jurisprudence.

4. In B.C. 149 the *Lex Calpurnia de Repetundis* established the first permanent Court or Quaestio Perpetua to deal with a certain class of crimes, *viz.*, extortion. Similar commissions continued to be appointed to deal with other classes of crimes till the time of Augustus.

Several results flow from this history of Roman criminal law which are of importance :

(i) The Comitia did not surrender its powers in delegating them to Quaestiones, and both continued to try cases side by side.

(ii) Of the three Comitia—Centuriata, Curiata and Tributa—the Comitia Centuriata only, as representing the people in their military capacity, had the right of inflicting capital punishment. But as it was the Comitia Tributa which ultimately superseded the rest, and was predominant when the Quaestiones began to be appointed, the latter did not inherit the power of inflicting the death penalty, which thus disappeared from Roman law of the Republican period. From this fact resulted the Proscriptions and the consequent harm to the constitution and the national character (pp. 395-7).

(iii) An undue multiplicity of courts and a wholly unmethodical classification of crimes were the result of the Quaestiones being established as an

emergency arose, by a law which included any crimes which at the moment demanded consideration. The result was that a man might be tried by several courts, if it was not clear to the jurisdiction of which his offence belonged, and though condemnation by one would put a stop to actions in the others, acquittal by one would not (pp. 399-400).

By means of successively appointed Quaestiones, many of what were formerly torts were absorbed into the class of crimes. After the fall of the Republic the Emperors gradually abolished the Quaestiones and nominated the magistrates themselves. Hence arose the idea that the Sovereign, as representative of the State, is the fountain of justice administered upon criminals guilty of offences against the State.

The development of criminal law was then hastened by—

1. The traditions of the Cæsars, and later of Charlemagne and his successors as representatives of the Majesty of the State.

2. The teaching of the Church that jurisdiction was committed by God to temporal rulers (*cf.* Gen. ix. 6; Rom. xiii. 1-7; *cf.* p. 404, 'After this it happened'—p. 405, 'like Himself.')

C.A. Press, Cowley, Oxford.